IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :20.12.2007

CORAM

THE HON'BLE Mr. JUSTICE K.VENKATARAMAN

Second Appeal No.807 of 2006

1.P.Sampoornam
2.P.Lingappan
3.Muthulakshmi
4.Palaniswamy
5.Rasammal ... Appellants/Defendants 2 to 6

Vs.

1.L.T.Somasundaram
2.L.T.Lingappan
3.L.T.Sivanandham
4.L.T.Palaniswamy ... Respondents/Plaintiffs

Second appeal filed U/S 100 of CPC against the Judgment and decree dated 02.09.2005 made in A.S.No.16 of 2005 on the file of Principal District Judge, Erode, confirming the judgment and decree dated 16.10.2003 made in O.S.No.672 of 1996 on the file of Second Additional Sub Court, Erode.

For appellants : Mr.N.Manoharan

For respondents : Mr.K.Rajasekar

J U D G M E N T

Defendants 2 to 6 in O.S.No.672 of 1996 on the file of the II Additional Subordinate Judge, Erode, are the appellants in the second appeal. The plaintiffs thereon are the respondents herein.

2. The parties in this second appeal, for the sake of convenience, are referred in the same position as they have been referred before the trial Court.

3. The plaintiffs have filed the suit in O.S.No.672 of 1996 against defendants 1 to 5 before the II Additional Subordinate Judge, Erode, for specific performance of the agreement of sale dated 06.07.1990, to deliver possession or in the alternative, directing the first defendant to pay a sum of Rs.2,47,478/- to the plaintiffs creating a charge over the suit property and to pay the costs. Pending suit, the first defendant died and his wife has been brought

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on record as sixth defendant.

4. The averments made in the plaint in nutshell are as follows:- The plaintiffs are the brothers. The first defendant is the father of defendants 2 to 5. Subsequent to the demise of the first defendant, his wife, the sixth defendant had also been added as a party. A sale agreement was entered into between the plaintiffs and the defendants on 06.07.1990 agreeing to sell the suit property for a sale consideration of Rs.1,50,000/- and on that date, a sum of Rs.1,40,000/- has been received as an advance. The defendants have undertaken to vacate the tenant from the portion of the suit property and to execute the sale deed after receiving the balance amount of Rs.10,000/-. Since the defendants were postponing the sale on the ground that they were not able to vacate the tenant, on 30.12.1990, an endorsement has been made on the rear side of the said sale agreement by the defendants to execute the sale deed within three months from the date of eviction of the tenant viz., Chinnasamy, son of Thesa Naicker. But, however, the defendants have not vacated the tenant and executed the sale deed. Hence, the plaintiffs issued a notice dated 13.07.1996 expressing their readiness and willingness to pay the balance amount and to get the sale deed executed. The fourth defendant alone received the said notice. Defendants 3 and 5 evaded to receive the same. No reply has been sent for the said notice. Hence, the plaintiffs were constrained to file the suit for the relief set out earlier.

5. The first defendant filed a written statement, which has been adopted by defendants 2 to 5 and the averments made thereon in brief are as follows:- It is true that the written agreement had been entered into between the plaintiffs and the defendants, but it was not intended to execute the sale deed in favour of the plaintiffs. It was only a money transaction and there was no intention to sell the suit property to the plaintiffs. Since the defendants approached the plaintiffs for a loan, as suggested by the plaintiffs, the agreement of sale was executed by the defendants only as a security. The property would be five times more than the agreed price and moreover for the balance of Rs.10,000/-, there is no necessity to give six months time. The suit property is not an agricultural property and it is situated adjacent to Sivagiri Bus Stand. After getting the registered agreement, from the defendants the plaintiffs obtained signatures on the back side of the third page of the agreement wherein nothing was written. The suit property has always been in the possession of the defendants and it was not leased out to anybody at any point of time. The endorsement made on the back of the third page of the agreement is a fabricated one. Since there was no tenant in possession of the suit property, the claim of vacating them and executing a registered sale deed within three months from vacating the alleged tenant does not arise in any manner. The suit is barred by limitation. There is no cause of action for the suit. Thus, the defendants sought for the dismissal of the suit.

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6. The learned II Additional Subordinate Judge, Erode, framed four issues, which are as follows:-

(i) Whether the plaintiffs are entitled to the relief of specific performance ?

(ii) Whether the plaintiffs were, to perform their part of contract always ready and willing to get the sale deed executed by paying the balance sale consideration ?

(iii) Whether the transaction that took place between the parties was money transaction ?

(iv) To what relief ?

7. Later, an additional issued has been framed by the trial Court as to whether the suit is barred by limitation ?

8. Before the trial Court, the first plaintiff examined himself as P.W.1 and one Kuzhandaiswamy, Murugesan and Ramachandran have been examined as P.Ws.2 to 4. Exs.A.1 to A.11 have been filed and marked on the side of the plaintiffs. On the side of the defendants, the fifth defendant examined himself as D.W.1 and one Kuppusamy, Subbaiyan and Murugesan have been examined as D.Ws.2 to 4. Exs.B.1 to B.30 have been filed and marked on the side of the defendants.

9. Considering the oral and documentary evidence, the learned trial Judge decreed the suit by his judgment and decree dated 16.10.2003. Aggrieved over the said judgment and decree, the defendants preferred an appeal in A.S.No.16 of 2005 before the learned Principal District Judge, Erode. The first appellate Judge also concurred with the finding of the trial Judge and dismissed the appeal by his judgment and decree dated 02.09.2005. The said judgment and decree are canvassed in the present second appeal.

10. I have heard Mr.N.Manoharan, learned counsel appearing for the appellants and Mr.K.Rajsekar, learned counsel appearing for the respondents and perused the pleadings, evidence and the judgment of the trial Court as well as the appellate Court.

11. The following substantial questions of law have been framed at the time of admitting the second appeal:-

(i) Whether the Courts below erred in not taking into consideration or giving a specific finding on the question whether the plaintiffs have come with clean hands to get the equitable relief under the sale agreement dated

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06.07.1990 in the light of various suspicious circumstances which would show that there is no bona fides on the part of the plaintiffs ?

(ii) Whether the time is essence of the contract under the suit sale agreement dated 06.07.1990 especially when the plaintiffs have approached the Court only after five years delay which has not been explained to the satisfaction of the Court ?

(iii) Whether the plaintiffs seeking the relief of specific performance would be deprived of equitable relief when they are not able to establish that they had performed or always been ready and willing to perform the terms of the contract ?

12. It is not disputed on the side of the defendants that an agreement of sale under Ex.A.1 was executed in favour of the plaintiffs. However, the case of the defendants is that they have borrowed money from the plaintiffs and as a security for repayment, the said agreement was executed at the instance of the plaintiffs. Hence, according to the defendants, Ex.A.1 agreement of sale was not intended for selling the suit property, but only as a security. Ex.A.1 agreement of sale is dated 06.07.1990. On the reverse of the said agreement of sale, at page No.3, an endorsement has been made to the following effect (English version of the same is given):-

" The reason for extending the time of the agreement of sale is that the property mentioned in the agreement is in the possession of S.T.Chinnasamy, son of Thesa Naicker, residing at Jeeva Street, Sivagiri, who took possession from the parties 1 to 5 herein as per the oral lease. Since the the parties 1 to 5 herein require time to evict the said Chinnasamy from the land and to give possession to the parties 6 to 9 herein, the parties 1 to 5 hereby agreed to execute the sale deed in favour of the parties 6 to 9 within three months."

13. It is the case of the defendants that the said endorsement was not there at the time of obtaining their signature and later it has been filled up by the plaintiffs.

14. The Courts below have relied much on Ex.A.11, the endorsement coupled with the fact that the defendants have not denied their signatures in Ex.A.1 agreement of sale, accepted the execution of the agreement of sale and further acceptance of their signature in Ex.A.11.

15. The question now arises is whether the defendants have executed the agreement of sale with an intention to sell the suit property to the plaintiffs or they have executed the said agreement

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of sale as a security for the loan obtained by them. As I said already, the agreement of sale is dated 06.07.1990. In the said agreement of sale, the price agreed was Rs.1,50,000/- and a sum of Rs.1,40,000/- was paid and the balance to be payable is Rs.10,000/- only. The time fixed for completion of the sale was six months. It is not known why for payment of Rs.10,000/-, six months time needed for the plaintiffs. Further more, in the said agreement of sale, there was no mention about the lessee in possession of the property in question. For the first time, in the endorsement under Ex.A.11, there was a reference about the lessee in the suit property. The said endorsement under Ex.A.11 does not specify a particular time, within which time the lessee shall be evicted and sale deed shall be executed in favour of the plaintiffs. The endorsement reads that as soon as the lessee vacates, within three months from the said date, sale deed shall be executed by the defendants. If really there was a lessee in the suit property, even in the original agreement of sale under Ex.A.1, there would have been a reference about the lessee. Further more, if the time has to be extended in order to vacate the lessee, definitely in the endorsement under Ex.A.11, some time would have been specified for eviction of the lessee. Unfortunately, in the endorsement under Ex.A.11, there is no reference about the said fact. As I said already, the endorsement reads that the defendants shall execute the sale deed within three months from the date of eviction of the lessee.

16. Now the question arises whether there was a lessee in the suit property. The defendants have clearly set out in their evidence that there was no lessee in the suit property. Further more, on the side of the defendants, Exs.B.1 to B.15, the settlement register and the Adangal extracts have been filed to show that they were and they are in possession of the suit property. The defendants have specifically stated in their written statement that the suit property has always been under their actual possession and it was not leased out to anybody at any point of time and the allegation that the suit property was leased out to Chinnasamy, son of Thesa Naicker is absolutely falsehood. P.W.1, the first plaintiff in his cross examination has clearly admitted that the said Chinnasamy is a building maistry and that he used to do maintenance work at his residence. The said Chinnasamy does not own any land. If really the said Chinnasamy used to do maintenance work at their residence, definitely the plaintiffs would have examined the said Chinnasamy to prove that he was a lessee under the defendants in respect of the suit property. This probablises the case of the defendants that they have not made any endorsement in Ex.A.11 for extending the time under the agreement of sale in order to evict the lessee and execute the sale thereafter in favour of the plaintiffs. When the existence of the lessee in the suit property is under cloud, the question of extending the time granted under Ex.A.1 as per Ex.A.11 endorsement causes a doubt whether such an endorsement would have been made by the defendants. It is to be noted that though the defendants

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admitted their signatures under Ex.A.11, they have specifically pleaded that at the time of signing on the reverse of Ex.A.1 agreement of sale, nothing was filled up. The said fact clearly probablises the case of the defendants that the said endorsement is created later by the plaintiffs.

17. Yet another reason that has to be put against the plaintiffs is that Ex.A.1 is dated 06.07.1990 and Ex.A.11 endorsement is dated 30.12.1990. If really the defendants have agreed to evict the lessee and agreed to execute the sale deed within three months from the date of vacating the tenant, the plaintiffs would not have kept quiet until the issuance of notice dated 21.08.1996. Anybody, who has paid 90% of the amount under the agreement of sale would not have waited for nearly six years for execution of the sale deed.

18. The other reasoning creates a doubt in my mind whether an agreement of sale would have been executed by the defendants in favour of the plaintiffs. Further more, the Courts below have not considered the plea of the defendants that there was no lessee in the suit property. This aspect has not been considered at all, even though a plea has been taken in this regard by the defendants followed by the cross examination of P.W.1 in that regard. The Courts below have considered mainly that the signatures in Ex.A.1 and Ex.A.11 have not been denied by the defendants and that for the notice, no reply has been sent.

19. The important issue is whether there was a lessee in the suit property which necessitated for extending the time for the purpose of executing the sale deed and the necessity for the endorsement under Ex.A.11. The relief of specific performance is a discretionary relief and the Courts have to exercise their discretion on sound and reasonable reasons. Even if a doubt arises whether it is probable or possible that an agreement of sale would have been executed at all, the discretionary relief shall not be granted. By analysing the matter in issue as referred to above, I am of the opinion that it is doubtful that the defendants would have executed an agreement of sale with an intention to sell the suit property. Further more, there is no reason for execution of Ex.A.11 endorsement since it has not been proved that there was a lessee in the suit property. Further more, after the endorsement dated 30.12.1990, the plaintiffs would not have waited till the issuance of notice under Ex.A.2 dated 13.07.1996. The silence for nearly six years by the plaintiffs causes much doubt whether there was a real agreement of sale between the plaintiffs and the defendants. Merely because the defendants have accepted their signatures in the endorsement under Ex.A.11, conclusion could not be reached that the defendants have entered into an agreement of sale with an intention to sell the suit property.

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20. The Division Bench of this Court had an occasion to consider this aspect in the case of V.K.Bhuvaneswari vs. N.Venugopal (2007 – 1 L.W. 318). Paras 14 to 17 of the said judgment can be usefully extracted here under:-

" 14. Having heard the contentions of the learned counsel for the respective parties, we take up issue Nos.(i) and (ii) together for consideration in the first instance.

Issue Nos.(i) and (ii):

(i) Whether Ex.A.1 agreement was not intended to be acted upon as claimed by the appellants ?

(ii) Whether there was a different agreement between the parties as claimed by the appellants ?

At the outset, it will have to be stated that existence of Ex.A.1 agreement was never in dispute. As far as application of Section 92 of the Indian Evidence Act is concerned, by virtue of Section 91 and having regard to the existence of Ex.A.1 agreement, the terms contained in Ex.A.1 are to be considered without any reference to any other oral evidence insofar as it related to the terms contained therein. In that respect, Sections 91 and 92 of the Indian Evidence Act are inter-dependent. In the light of the evidence available on record, both oral and documentary, as well as the application of Section 92 of the Indian Evidence Act, there is no scope to permit the appellants to contradict, vary or subtract the terms contained in Ex.A.1 agreement. Therefore, even taking Ex.A.1 agreement on its face value, what has to be considered is whether the contention put forward on behalf of the appellants that it was never intended to be acted upon, requires consideration. On this aspect, we find that the decisions relied on by learned counsel for the appellants Mr.R.Subramanian as reported in 2003 (6) SCC 595 = 2003 - 3 L.W. 261 (supra) and 2004 (4) SCC 794 = 2004-4-L.W. 53 (supra) fully support his contention.

15. In the judgment reported in 2003 (6) SCC 595, in paragraph 22, the Supreme Court has stated that legal position as regards the substantive part of Section 92 of the Indian Evidence Act in the following words:-

"22. This Court in Gangabai v. Chhabubai (1982 (1) SCC 4: AIR 1982 SC 20 = (1982) 95 L.W.15 & 138 S.N.) and Ishwar Dass Jain v. Sohan Lal (2000 (1) SCC 434: AIR 2000 SC 426 = 2000-1-L.W.425) with reference to Section 92 (1)

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held that it is permissible to a party to a deed to contend that the deed was not intended to be acted upon but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties".

16. In the decision reported in 2004 (4) SCC 794 = 2004-4-L.W.53, the Supreme Court has held as under in paragraph 9:

"... An enquiry into reality of transaction is not excluded merely by availability of writing reciting the transaction. Tyagaraja Mudaliyar vs. Vedathanni (AIR 1936 PC 70: 64 1A 126=(1936) 43 L.W.271) is an authority for the proposition that the oral evidence in departure from the terms of a written deed is admissible to show that what is mentioned in the deed was not the real transaction between the parties but it was something different..."

17. From the above ratio laid down by the Supreme Court, when we analyse the stand of the parties, according to the appellants, irrespective of the fact that Ex.A.1 came into being, it was contended that the deed was never intended to be acted upon and that it was a sham document. When the said stand is probed into further, as held by the Supreme Court, the bar under Section 92 of the Indian Evidence Act vis-a-vis Ex.A.1 would operate if only the appellants attempt to rely upon Ex.A.1 agreement and simultaneously sought to vary and contradict its terms. Such is not the case of the appellants. The appellants are not attempting to contend that the terms contained therein are to be varied of that the evidence let in on their side was to contradict the terms contained therein. According to the appellants, the entire evidence let in both oral and documentary, was only to demonstrate that in spite of existence of Ex.A.1, it will have to be held that the parties had a different contract altogether and Ex.A.1 was never intended to be acted upon. At the risk of repetition, we state that applying the ratio laid down by the Supreme Court, such a stand of the appellants was certainly not prohibited under Section 92 of the Indian Evidence Act."

21. As I have already held, in a suit for specific performance, the discretionary relief could be granted only if the plaintiffs make out a case, that too a strong case for exercising the

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discretion by the Courts. Since I am of the opinion that the plaintiffs have not come out with a true facts, they are not entitled for the discretionary relief.

22. Considering the totality of the circumstances, though the plaintiffs have succeeded before both the Courts below, I am inclined to interfere with the findings that have been arrived at by the Courts below.

23. In the result, the second appeal stands allowed and the judgments and decrees of the Courts below are set aside. However, there is no order as to costs. Consequently, M.P.Nos.1 and 2 are closed.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

sbi

To

1.The Principal District Judge,
Erode.

2.The II Additional Sub Judge,
Erode (with records).

3.The Record Keeper,
V.R.Records, High Court, Madras.

+1cc to Mr.N.Manokaran, Advocate Sr 75817
+1cc to Mr.K.Raja Sekar, Advocate SR 76013

RS (CO)
km/3.4.

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